89-1608

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

E. STANTON MAXEY, M.D.,

Petitioner

v.

DAN G. KADROVACH, DAVID K. McAFEE, M.D. AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition for certiorari presents the following questions for review to the Supreme Court of the United States:

1. Whether the Veteran's Administration's termination of the petitioner's employment was, as reflected in the administrative record, unlawful and should be set aside.

2. Whether the refusal to allow discovery and supplementation of the administrative record by evidence outside of the record was proper.

3. Whether the petitioner, as a Veteran's Administration probationary physician, has a right to assert constitutional tort claims against fellow employees arising from the employment relationship and the counts of constitutional torts against Dr. McAfee and Mr. Kadrovach were improperly dismissed.

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REFERENCE TO REPORTS BELOW

1. Petitioner filed this suit on March 15, 1988, in the United States District Court, Western District of Arkansas, Fayetteville Division, to redress his wrongful termination as a Veteran's Administration (V.A.) surgeon. Five counts were asserted. Four counts sought relief against the United States of America and two employees of the V.A., individually, for the constitutional torts of infringement of free speech and violations of due process. The fifth count sought relief under the Administrative Procedures Act, 5 U.S.C. §§701, et seq. The district court on October 12, 1988, dismissed the first four counts alleging constitutional torts. *Maxey v. Kadrovach*, 696 F.Supp. 425 (W.D. Ark. 1988). By its unreported opinion rendered on May 11, 1989, the district court denied the petitioner's request to perform pretrial discovery and to present evidence supplemental to the administrative record, and the district court rendered its final judgment, dismissing with prejudice the petitioner's final remaining count.

2. The petitioner appealed to the United States Court of Appeals for the Eighth Circuit. On November 20, 1989, the Eighth Circuit Court of Appeals affirmed. *Maxey v. Kadrovach*, 890 F.2d 73 (8th Cir. 1989).

3. A petition for rehearing was summarily denied by the Eighth Circuit Court of Appeals in an unreported

decision dated January 12, 1990.

STATEMENT OF GROUNDS OF JURISDICTION

This Court has jurisdiction under the provisions of 28 U.S.C. §1254 and Rule 10 of the Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment 1 (App. 187)
2. United States Constitution, Amendment 5 (App. 187
3. 5 U.S.C. §706 (App. 188)
4. 38 U.S.C. §4110 (App. 189)

STATEMENT OF THE CASE

Dr. Maxey was first hired by the V.A. as a staff surgeon effective October 26, 1986, at the Big Spring, Texas, V.A. Medical Center (App. p. 50). In August 1987, Dr. Maxey transferred to the Fayetteville, Arkansas, V.A. Medical Center and was granted temporary clinical privileges in general surgery on August 6, 1987 (App. pp. 61-63). By memorandum dated

August 10, 1987, the V.A. instructed Dr. Maxey to request surgical privileges in "*all* areas" that he desired to practice (emphasis in original) (App. p. 63). Upon his request, such privileges, limited to certain surgical fields, were granted effective September 15, 1987 (App. pp. 63-72).

On September 24, 1987, the Fayetteville Medical Center adopted its "Bylaws, Rules and Regulations of Medical Staff." ("Bylaws") (App. p. 73-97). They were applicable to Dr. Maxey as well as all other staff physicians (App. p. 73); promoted medical care "of the highest quality" (App p. 74); and required ethical behavior (App. p. 76, 78).

For patient care, the Bylaws divided the medical staff into nine services including a "Medical Service" and a distinct "Surgical Service" and provided for assignment of physicians to services based upon carefully documented and reviewed professional qualifications (App. pp. 79-80) to assure "highest quality of treatment" (App. p. 81). Patients were assigned to the "service . . . concerned in the treatment of the disease process which is identified" (App. p. 90). Temporary staff privileges were not routinely granted, but:

> [I]n an emergency where a suitably qualified professional staff member is not available, the . . . Director may call upon an available specialist for assistance in meeting the clinical

> situation and grant temporary staff privileges *for such emergency purposes"* (App. p. 77, emphasis added).

The only non-surgical duties initially assigned Dr. Maxey were per the Medical Officer of the Day ("MOD") regulations. V.A. regulations state that "[o]ne or more *physicians* will be scheduled and assigned to provide medical supervision during evenings, nights, weekends and holidays when the regular medical staff is not on duty" (App. p. 98, emphasis in original). Local regulations implementing this provided that MOD duties terminated at the end of each 24-hour shift (App. p. 104).

From October 26 to December 11, 1987, the Chief, Medical Service, Fayetteville V.A. Medical Center, Dr. John Bergstrom, was absent, causing an increased workload for the remaining Medical Service physicians. (App. pp. 108, 114). Prior to his departure, Dr. Bergstrom personally developed the plan to alleviate the increased workload caused by his absence. That plan used Surgical Service personnel as "primary physician" for the Medical Service patients (App. p. 114). It was implemented on November 16, 1987, by a memorandum from defendant, Dr. David K. McAfee, Chief, Surgical Service, noting that certain *medical* patients admitted to the *medical* ward would become the *primary responsibility* of the *Surgical Service* and that the *Surgical Service*

physician assigned to each patient would have the *primary responsibility* for such patients (App. p. 114). Emphasis has been added because assignment of *primary patient responsibility* to surgeons for Medical Service patients (as opposed to assigning merely "care" or "treatment" responsibilities) triggered the dispute leading to Dr. Maxey's dismissal. At a surgical staff meeting the day this memorandum was issued, Dr. Maxey questioned the propriety of the assignment of "primary responsibility" and was answered by Dr. Brannon, the acting Chief, Surgery Service, "any time there was a problem with responsibility he felt sure it could be delegated" (App. p. 119).

On November 17, Dr. Maxey made written request for exemption from the assignment of Medical Service duty until an opinion could be obtained from the V.A.'s own counsel and the American College of Surgeons (App. p. 120). Dr. Maxey's request evoked a November 19 response from the acting Chief of Staff through the Chief, Surgical Service (Dr. McAfee), that Dr. Maxey would be "responsible for medical patients admitted to Ward 3B-Medicine" (App. p. 122). On November 20, a second memo was received by Dr. Maxey from Dr. McAfee as Chief, Surgical Service, indicating that both Dr. McAfee and the "district counsel" considered Dr. Maxey's reasons for not complying with the directive not valid and directing Dr. Maxey to resolve the matter by November 23 (App. p. 123). On November 23, Dr. Maxey received the written

opinion of his lawyer that, while Dr. Maxey may be exempted from malpractice liability by the Federal Tort Claims Act, the ethics and morality of his assuming such responsibilities remained in question. Copies of the letter went to the V.A. district counsel, as well as Dr. Maxey's congressional representatives (App. pp. 125). On November 27, the V.A. district counsel forwarded the letter to the Director of the Fayetteville V.A. Medical Center, defendant Mr. Kadrovach, noting it was Mr. Kadrovach's decision as to whether and how responses should be made to Dr. Maxey's lawyer and congressional representatives (App. p. 126).

The V.A.'s response came on November 30, 1987, when Dr. McAfee verbally counseled Dr. Maxey. In the counseling, Dr. Maxey requested that patients for which he was *responsible* be transferred to the Surgical Service or that the wording of the directive ("primary responsibility" being at issue) be changed; Dr. McAfee reiterated his intent to stand by the directive to keep medical patients on the Medical Service and characterized Dr. Maxey's position as insubordination (App. p. 127). On December 1, 1987, Dr. McAfee issued Dr. Maxey a written "intent to reprimand," citing Dr. Maxey's refusal to assume, responsibility for medical patients as the reason. He was allowed until December 8, 1987, to respond (App. p. 128), and he responded on December 7, noting among other concerns the general applicability of the ethics and quality provisions of the V.A. Bylaws and the specific limitations imposed by both

his own competence and his permitted clinical privileges (App. pp. 129-132).

A letter of reprimand dated December 10, 1987, was prepared over the signature of Mr. Kadrovach, noting that Dr. Maxey's response had been considered reprimanding Dr. Maxey for failing to assume the assigned responsibility for Medical Service patients. (App. p. 132). By regulation, reprimands are issued "to correct an employee for a violation . . . which is not serious enough to justify separation from the service" (App. p. 150). The letter of reprimand was delivered to Dr. Maxey on December 13, 1987 (App. pp. 152, 153), at which time he requested, in writing, an interview with Mr. Kadrovach to seek a resolution "which serves our mutual interests, our veterans and this facility without such dishonor" (App. p. 153).

After the December 13 delivery of the reprimand, the administrative record refers to a sole act by Dr. Maxey which may have violated the memorandum: On December 14, he sought a consultation from dermatology on a case of crabs infestation (App. p. 154); Dr. McAfee denied the consult (App. p. 154).

Also on December 14, Dr. Bergstrom had returned (App. p. 9), and due to Dr. Maxey's stance and the illness of another staff surgeon, the memorandum was rescinded (App. p. 10-2). The record reflects no

answer by Mr. Kadrovach to Dr. Maxey's letter requesting a resolution. Dr. Maxey received a notice dated December 15 that a probationary summary review of his appointment as a V.A. physician would be conducted by the Physicians Professional Standards Board, on December 30, 1987 (App. pp. 155-158).

At that time, the Physicians Professional Standards Board was comprised, pursuant to a Medical Center memorandum dated May 22, 1987, of the Chief of Staff as Chairman; Chief, Surgical Service (alternate being Assistant Chief); Chief, Laboratory Service; and Chief, Medical Service (alternate being Assistant Chief) (App. p. 159). However, the prescribed standing Board was replaced on December 16 by an *ad hoc* Board, appointed by Dr. McAfee, and approved by Mr. Kadrovach. Dr. Bergstrom, who by his absence and proposal to alleviate workload resulting from such absence was directly responsible for the contested memorandum, was appointed *ad hoc* chair. (App. pp. 161, 162). Dr. McAfee disqualified himself, but did not replace himself with his Assistant Chief, Dr. Brannon, per the standing memorandum of May 22, 1987 (App. p. 159), but with a Dr. Gocio from the Little Rock, Arkansas, V.A. Medical Center. The Chief, Laboratory Service, did not serve, but rather Dr. Bratton, a psychiatrist. Dr. Bergstrom, now chairing, was not replaced as required with his Assistant Chief, but rather with another Medical Service doctor, Dr. Daut (App. pp. 161, 162). The only reason that appears in the record for

the wholesale *ad hoc* dismantling and reincorporation of the standing Board is the statement of Dr. McAfee regarding "circumstances . . . and the involvement of several members of the [standing] Board" (App. p. 161).

On December 29, at 5:27 p.m. the evening before the Board hearing, Dr. Maxey was notified that the notice of his summary review delivered to him on December 16 (App. p. 175) was incorrect, in that the findings of the Board convening on the following morn would be final, rather than recommendatory to a final approving authority (App. pp. 175, 176).

The Physicians Professional Standards Board met on December 30, 1987 (App. pp. 162-169). All evidence reviewed, except the crabs referral of December 14, dealt with incidents occurring prior to Dr. Maxey's receipt of the letter of reprimand on December 13 (App. pp. 176-180). The Board also heard testimony from Dr. McAfee, which was erroneous in material part:

> After formal reprimand . . . Dr. Maxey entered an order on a patient's record to transfer the patient to Medical Service as 'Dr. Maxey does not assume responsibility for Medical Service patients' (App. pp. 164-165).

That record of transfer referred to by Dr. McAfee was actually dated December 12 (App. p. 181), and Dr. Maxey did not receive the reprimand until December 13,

1987 (App. pp. 152, 153). The record is devoid of any evidence that an "emergency," as contemplated in the Bylaws to necessitate doctors serving outside of their service, existed, or that a conflict with the Bylaws was even considered.

The Board found that Dr. Maxey was "not fully qualified and satisfactory as a V.A. physician" and recommended separation (App. p. 163). Dr. Maxey was notified of his separation on January 7, 1988, effective January 15, 1988 (App. p. 183).

Dr. Maxey sued Mr. Kadrovach, Dr. McAfee and the United States of America pursuant to 8 U.S.C. §1331 seeking as redress for wrongful, involuntary termination as a V.A. surgeon reinstatement, expungement of adverse records and front and back pay.

Upon the Government's motion to dismiss all counts, the district court in its opinion of October 12, 1988, dismissed the four counts alleging constitutional tort. Subsequently, an administrative record was stipulated and filed. By its opinion rendered May 11, 1989, the district court refused to allow either pretrial discovery by Dr. Maxey or the presentation of any evidence supplemental to the administrative record. Without providing Dr. Maxey any chance to brief his case, the district court's opinion dismissed with prejudice Dr. Maxey's remaining count. On November 20, 1989, the Eighth Circuit Court of Appeals affirmed, (App. pp.

1-9). and on January 12, 1990, summarily denied petition for rehearing.(App. p. 49).

REASONS FOR GRANTING THE WRIT

I. THE VETERAN'S ADMINISTRATION'S TERMINATION OF THE PETITIONER'S EMPLOYMENT WAS, AS REFLECTED IN THE ADMINISTRATIVE RECORD, UNLAWFUL AND SHOULD BE SET ASIDE.

5 U.S.C. §706, which provides that the court shall: . . . [H]old unlawful and set aside agency action, findings and conclusions found to be—(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (C) . . . Short of statutory rights; (D) Without observance of procedure required by law.

Both the substance of the V.A.'s decision and the procedures are fatally flawed, and neither of the courts below fully addressed or resolved the following:

1. Unlawfulness of the Memorandum of November 16, 1987. The V.A.'s action in referring Dr. Maxey to a board as a result of his response to the November 16 memorandum can hardly be characterized as anything other than "arbitrary and capricious." The V.A. had adopted the Bylaws limiting Dr. Maxey's primary responsibilities to surgery and setting the procedures by which patients were carefully admitted,

diagnosed and assigned to either Surgical Service, Medical Service or other Services to obtain the highest quality treatment. Despite the Bylaws, the V.A.insisted through the November 16 memorandum that certain patients, acknowledged to be properly assigned for Medical Service, nevertheless be put under the primary responsibility of a surgeon; and then deemed, by its use of a reprimand, Dr. Maxey's course of action in response to these conflicting orders, "not serious enough to justify separation from the service," yet promptly dismissed him.

The Board and courts below completely ignored specific provisions of the Bylaws directing:

> Delineation of clinical privileges will be documented for all professional personnel involved in direct patient care to assure the highest quality of treatment at this health care facility. . . . Assignment of the professional staff depends upon the individual's professional qualifications. . . . The professional services in the Medical Center under the Chief of Staff consist of: Medical Service, Surgical Service . . . [and] temporary staff privileges will not be routinely granted. However, in an emergency where a suitably qualified professional staff member is not available, the Medical Center Director may call upon an available specialist for assistance in meeting the clinical situation and grant

> temporary staff privileges for such emergency purposes. (App. pp. 79-81)

Neither the Board nor the courts below looked for or found the requisite "emergency" necessary for a Surgical Service physician to treat patients assigned to the Medical Service under the specific Bylaw that provides "all patients . . . shall be assigned to the service or section concerned in the treatment of the disease process which is identified" (App. p. 90).

While the circuit court noted Dr. Maxey's right to request consultative assistance, it failed to realize that it was a single such request (a consult to dermatology for crabs) that triggered his appearance before the disciplinary board. Even if an emergency had been found to exist, the V.A. Bylaws contemplate a "specialist" from outside the staff (hence the necessity of "temporary staff privileges") rather than the abuse of an existing staff surgeon being assigned as an unqualified fill-in on the Medical Service.

The crux of this particular issue is that the V.A. issued Dr. Maxey irresolvably conflicting orders. The memorandum was unlawful because it was directly in conflict with the specific provision of the Bylaws, placing Dr. Maxey in a dilemma which, depending on his response, put him in direct violation of either the Bylaws or the memorandum. Termination under these circumstances is, indeed, unlawful by virtue of being all

of "arbitrary, capricious, an abuse of discretion and without observance of procedures required by law."

2. Notice of the Board Hearings, as Required by V.A. Regulations Implementing Applicable Law, Was Not Given to Dr. Maxey. DM&S Supplement MP-5, Part 2 (App. pp. 134-152) is the V.A. regulation implementing 38 U.S.C. §4106(b), pertaining to probationary V.A. physicians. 4.06(b) of that Supplement dictates that the board hearing notice provided to an employee will be:

> . . . in writing . . . and as a minimum contain the following: . . . explanation that the purpose of the board is to conduct an impartial review of his services and to make recommendations to the Chief Medical Director or field station head, as appropriate, whose decision is final.

The notice contained this language: "The purpose of the Board is to conduct an impartial review and make recommendations to the appropriate approving authority whose decision is final." (App. p. 155)

Dr. Maxey was not correctly notified until 5:27 p.m. the day before the hearing.

Notice being required by the regulation, it is fair to impute reasonable final notice; and if the final effect of the Board hearing is a necessary part of that notice, it is urged that it was contrary to the regulation,

arbitrary and capricious to incorrectly notify Dr. Maxey of the legal effect of the Board's determination up until the night before the Board was actually to convene. To advise a petitioner on the eve of hearing that previously stated and relied upon rights of appeal have been extinguished is arbitrary, and the court below improperly presumes too much by assuming that this drastic change in procedure had no effect on Dr. Maxey's response.

3. The Prejudice of the Board Chairman, Dr. Bergstrom, Against Dr. Maxey Was Contrary to Regulation Implementing Statute. The regulation implementing the statutory probationary review requires that "persons in a position to prejudice the action of the board may not serve as members of the board conducting the review." (App. p. 147 §4.06[c][9]). As noted in detail above, the memorandum of November 16, obviously in conflict with the Bylaws, required a careful and unprejudiced evaluation of the facts in light of that conflict. Dr. McAfee properly disqualified himself, but personally chose all of the members of the *ad hoc* Board. Two other doctors, who per the standing order should have served, being the Chief of Staff and Chief, Laboratory Service, did not serve (App. p. 159). The record is silent of any mention of their names or any particular circumstances which dictated their removal from the Board. Obviously prejudicial is the fact that Dr. Bergstrom not only remained on the Board but served as its Chairman. This is the same Dr. Bergstrom who was Chief, Medical Service, whose absence necessitated the

contested memorandum (App. pp. 113, 114), and whose particular idea it was that surgeons provide the resources to alleviate the increased workload in the Medical Service resulting from his absence! (App. p. 113)

The Eighth Circuit cited two cases for its conclusion that Dr. Bergstrom was not prejudiced, neither of which bear significant factual relevance. Those cases do lead to relevant precedent demonstrating that the prejudice here was so material as to disqualify the proceedings. The circuit court cited *Gilbert v. Johnson*, 419 F.Supp. 859 (N.D. Ga. 1976), *aff'd in relevant part*, 601 F.2d 761 (5th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980), where the plaintiff V.A. physician, Dr. Gilbert, challenged the actions of a Dr. Musser, who had been directly involved in adverse administrative actions against Dr. Gilbert, in appointing Dr. Gilbert's board. The Court found:

> Plaintiff has not shown or even alleged exertion of pressure or influence on the board members. . . . Absent any specific allegations of misconduct, bias or prejudice by the board members in this case *(there is none alleged)*, the Court rules that the appointment of these board members by . . . Musser complied with the V.A.'s regulations. (419 F.Supp. 859 at 871, emphasis supplied)

In *Klinge v. Lutheran Charities Ass'n.*, 523

F.2d 56 (8th Cir. 1975), the discharged physician, Dr. Klinge, argued that the board appointed in his case, comprised of staff physicians from his hospital, had prejudged his case (supra, p. 62). The only allegations of prejudice were a general familiarity with the case. The Court found:

> . . . Administrative fact finders are not necessarily disqualified from participating in an adversary proceeding simply because they have been exposed to evidence present in non-adversary investigative procedures that were filed prior to the adversary hearing.

The *Klinge* court found that the plaintiff's arguments about the hearing panel were not dissimilar to the arguments advanced in another case, *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974). A review of that case shows that it, too, is inapposite to the facts in Dr. Maxey's case.

In *Duffield*, the plaintiff doctor actually performed a very thorough voir dire on the committee, stating for the record that he had "no reason to suspect that any one of you would do anything other than fair and impartial" (at p. 516). The doctor unsuccessfully urged on appeal that due process "proscribe[s] completely any exposure on the part of the tribunal or its members to the factual issues of the proceeding prior to final decision" (at p. 517), an argument Dr. Maxey does

not make.

However, in considering Dr. Duffield's argument, the court noted a case that factually *is* relevant to Dr. Maxey's situation, *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757 (6th Cir. 1966). That case is distinguished in the *Duffield* case because the *American Cyanamid* case involved a hearing commissioner who, prior to the time the case was under consideration, had participated as counsel for a congressional committee which gave him particular views and opinions as a result of this "extrajudicial source," unconnected with his "participation in the case and who *"had expressed a firm opinion on the issues during those 'extrajudicial' proceedings" (Duffield,* at p. 518, emphasis supplied). Dr. Bergstrom personally and materially participated in the issuance of the contested memorandum, before it was ever contested and before he was appointed to chair the board to decide its validity. As was the hearing commissioner in the *American Cyanamid* case, Dr. Bergstrom's participation in that memorandum itself "expressed a firm opinion" on its validity, an unavoidable "prejudgment."

In none of these cases were *any* allegations of specific prejudice made, except the *American Cyanamid* case; and in that case, the administrative board *was* determined to be prejudiced.

It is quite clear that Dr. Bergstrom was

already "prejudiced," that the arrangement was a legal one: It had been designed by him, for his benefit and implemented at his request. As Board Chairman, he was, contrary to the applicable regulations, unquestionably a "person in a position to prejudice the action of the board," and a board so composed is not only "without observance of procedure required by law" but also "an abuse of discretion" (5 U.S.C. §706(2)(A) and (D)).

II. THE REFUSAL TO ALLOW DISCOVERY AND SUPPLEMENTATION OF THE ADMINISTRATIVE RECORD BY EVIDENCE OUTSIDE OF THE RECORD WAS IMPROPER.

Dr. Maxey's request to pursue discovery and evidentiarily supplement the record was denied. (App. B2, A7) It is the well settled general rule that the court is limited to deciding an appeal under the Administrative Procedure Act on the administrative record. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275 (D.C. Cir. 1981).

However, *Corning Savings & Loan Association v. Federal Home Loan Bank*, 736 F.2d 479 (8th Cir. 1984), also recognizes a well established exception to the general rule. If the aggrieved party can make a "strong showing of bad faith or improper behavior," *Corning* at 481, then the record can be evidentiarily supplemented. A slightly different variation of the rule was stated in *General Research Corporation v.*

United States, 541 F.Supp. 442, 446 (E.D. Va. 1982), that if "sufficient irregularities" are shown concerning bad faith, then the court is allowed to receive evidence outside the administrative record. A party seeking discovery must show specific facts to indicate that the challenged action was reached because of improper motives; more than bald assertions of bad faith are necessary to so proceed. *Friends of Shahwanguenks, Inc. v. Watt*, 937 F.R.D. 663, 667-668 (D.C. N.D.N.Y. 1983).

The district court interpreted this to find:

> To contend that "bad faith" played a role in an administrative decision is, in essence, to assert that even if there is sufficient objective support for the administrative decision, the objective evidence was not the true reason for the termination. (App. p. 12).

Somehow, the court worked the proper law conclusion into a conclusion that, regardless of any bad faith whatsoever, if the administrative decision was based upon any kind of objective evidence, even a "bad faith" showing would not entitle the plaintiff to pursue discovery and evidentiarily supplement the record (App. pp. 12). The Eighth Circuit summarily affirmed, concluding that the allegations of misconduct fell short of the required showing (App. p. 9).

If correct, this reasoning extinguishes the

"bad faith" exception. If a court accepts the administrative record on its face as being true and then finds from that administrative record that the decision was "sufficiently supported" (App. p. 13) when, in fact, the evidence presented in that administrative record may well be materially false, or the Board is improperly convened or the members are demonstrably prejudiced, the court has performed its judicial review of an administrative record built on procedural sand. The court, by treating the administrative record in isolation, precluded Dr. Maxey from demonstrating that the foundations under the administrative record are flawed.

Petitioner has the burden of demonstrating prima facie "bad faith," but having demonstrated that, he is entitled to draw back the curtains so that the light of additional evidence can illuminate the flaws in the administrative record. The matters already before the court contained sufficient evidence of "bad faith" to dictate that discovery and presentation of additional evidence should have been allowed to-wit:

Dr. McAfee's testimony to the Board that Dr. Maxey's reprimand occurred before his refusal to see a certain patient was materially false, as more fully discussed in the statement of the case. Dr. McAfee's false statements to the Board are prima facie evidence of "improper behavior," "bad faith" or "sufficient irregularities," and discovery would have shown, first, why Dr. McAfee made the misrepresentation and,

second, whether the Board members would have reached a different result had they realized that Dr. McAfee's statements were materially false.

A second indicia of "improper behavior" or "bad faith" was the manner in which the Board was formed by Dr. McAfee, who having disqualified himself yet put on the Board as Chairman Dr. Bergstrom, whose personal and professional interests in the outcome were inseparably interwoven with Dr. McAfee's actions. The Board, having been formed with a prejudiced Chairman, discovery would have developed additional, cogent evidence as to why the Board was so formed, and what effect this had on the presumably "correct" and "objective" results.

Next, the contested memorandum was directly in conflict with clear provisions of the Bylaws, defining distinct patient care services, assignment of patients and physicians among those services and the requirements of an "emergency" to contravene these dictates; but the Board's findings are mute of any consideration of the applicability of these Bylaws. Discovery would have shown whether the Board was *even aware* of the dictates of the Bylaws. Dr. Gocio was, in fact, not even a member of the Fayetteville V.A. medical staff and, presumably, was unaware of its Bylaws. When the Board visibly failed to even consider the Bylaws, its decision is impugned.

Finally, the notice which regulations required that Dr. Maxey receive was erroneous, and certain of the "minimum" information required in that notice was withheld from Dr. Maxey until the evening before the hearing. Again, this is "bad faith" and "irregularities" on the Government's part and discovery would have revealed why such urgency by the V.A. to stamp out "insubordination" rather than do a fair consideration of the propriety of its actions and Dr. Maxey's reactions.

The district court's denial of the requested discovery made a conclusive presumption of regularity and objectivity to the Board findings in the face of ample "bad faith" in the record which showed the court that it should consider additional evidence to determine whether the personnel and means by which those findings were rendered were themselves flawed.

III. A VETERAN'S ADMINISTRATION PROBATIONARY PHYSICIAN HAS A RIGHT TO ASSERT CONSTITUTIONAL TORTS AGAINST FELLOW EMPLOYEES ARISING FROM THE EMPLOYMENT RELATIONSHIP, AND THE COUNTS OF CONSTITUTIONAL TORT AGAINST DR. McAFEE AND MR. KADROVACH WERE IMPROPERLY DISMISSED.

The district court, in dismissing the constitutional counts, grappled with a morass of not easily reconciled decisions. However, starting with the

case of *Bush v. Lucas*, 462 U.S. 367 (1983), the Court found that a constitutional tort action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), would not be implied if Congress either (1) has developed a comprehensive remedial system for the redress of a plaintiff's grievances, or (2) if special factors exist which counsel against such an implication. The Court looked at the case of *Franks v. Nimmo*, 796 F.2d 1230 (10th Cir. 1986), which found that the remedies available to a probationary physician, though limited, were meaningful, being part of the "comprehensive remedial system."

The district court found support for the the "special factors" prong of the test in *Schweiker v. Chilicky*, 487 U.S. —, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), where the Supreme Court dismissed *Bivens* claims, holding that continuing review statutes were "a special factor" precluding a *Bivens* action, notwithstanding that the remedies were limited under those, and cited this from the *Chilicky* decision at U.S.L.W., p. 4770:

> When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Another case originally in support of Dr.

Maxey's *Bivens* actions, *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), was vacated by the Supreme Court at 101 L.Ed. 897, for reconsideration in light of *Chilicky*. Based upon this precedent, the courts below concluded that the remedies available to Dr. Maxey were meaningful and constitutionally adequate, even if not as extensive as those available to a nonprobationary employee; and that "congressional inaction has not been inadvertent," altogether constituting special factors counseling against the implication of a *Bivens* action. (App. p. 5).

In *McIntosh, et al. v. Turner*, 810 F.2d 1411 (8th Cir. 1987), rehearing at 861 F.2d 524 (8th Cir. 1988), in which the original Eighth Circuit opinion was favorable to Dr. Maxey, upon remand from the Supreme Court based upon the *Chilicky* decision, the circuit court held "only if Congress' omission to recognize a constitutional tort claim was inadvertent will the courts be free to allow such a claim in the case of federal employees."

In 1986, Congress passed the Health Care Quality Improvement Act, which was codified at 42 U.S.C. §§11101 through 11152. The Act aimed to remedy the increasing occurrence of medical malpractice by restricting the ability of incompetent physicians to move from state to state without discovery of their previous incompetence. The proposed remedy was effective professional peer review, but it was presumed that physicians were discouraged from participating in

effective peer review because of the threat to reviewing physicians of liability for damages arising from their reviewing activities. The law thus provides that physicians participating in professional review actions will not be liable for any damages, but only if certain standards of the statute are met.

The standards established are of a due process nature, to ensure than any professional review will not unfairly characterize a physician being reviewed; if met, then the reviewers are not liable for damages brought by a physician who was reviewed.

The due process standards are set forth primarily in §11112 and include a hearing, not less than 30 days' notice, lists of witnesses, an arbitrator mutually acceptable to the physician and the health care entity, hearing officers who are not in direct economic competition with the physician, right to representation by an attorney, right to call, examine and cross-examine witnesses and rights to present evidence determined to be relevant by the hearing officer.

In none of the cases relied upon below (*Chilicky*, *Kotarsky* or *McIntosh*, supra) was the involved employee a probationary employee of the Veteran's Administration or a physician. And, in none of those cases, would the characterization of the board action affected the future employability of such physician. Those cases are not on point. The Health Care Quality

Improvement Act clearly indicates that Congress contemplates that reviewing physicians *will and should* be subject to civil liability if the mandates of that Act are not met. With respect to Dr. Maxey, Congress is not guilty of an "omission to recognize a constitutional tort claim" as contemplated in *McIntosh*, supra; indeed, Congress has specifically recognized such tort liability by its concern, expressed in this Act, that its physician employees will be liable for such damages if they do not follow the constraints of the Act in the professional review process.

§11152 specifically requires that the Secretary of Health and Human Services shall seek to enter a memorandum of understanding with the Administrator of Veterans Affairs to apply the provisions of the title pertaining to reporting to hospitals and other facilities and health care providers under V.A. jurisdiction. This memorandum was to have been established not later than November 14, 1988. The import of this memorandum, of necessity, was to ensure that no reports would be made in the absence of the due process constraints provided in the Act.

Congress has recognized that the remedies VA probationary physician employees have, though limited, include the right to sue other employees of the V.A. who may negatively characterize their conduct and competence. Congress has developed certain procedures which the V.A. and its professional standards boards

should follow if they do not expect to be so sued. Those standards were obviously violated in this case. It is inappropriate for the courts, in light of this law and these facts to speculate upon what Congress' intent was regarding a *Bivens* action; Congress clearly expressed in this Act its interpretation of the law that Dr. Maxey is entitled to bring such an action, and the tests developed by the courts to otherwise construe congressional intent simply do not come into play here because Congress has clearly expressed that intent.

CONCLUSION

The United States District Court and the Circuit Court of Appeals in affirming the decision have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

For these reasons, a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Appendix

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United States Court of Appeals
For the Eighth Circuit

No. 89-1973

E. Stanton Maxey, M. D.
Appellant

v.

Dan G. Kadrovach, David K. McAfee, M.D., and the Veterans Administration, an Agency of the United States of America,
Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: October 12, 1989
Filed: November 20, 1989

Before McMILLAN, JOHN R. GIBSON, and MAGILL, *Circuit Judges.*

PER CURIAM:

E. Stanton Maxey, M.D., appeals from the district court's[1] dismissal of his constitutional tort claims

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[1]The Honorable H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas.

and ruling in favor of defendants on his claim under the Administrative Procedure Act (APA), 5 U.S.C. §§701-706, arising from his discharge as a Veterans Administration (VA) physician. We affirm.

On October 26, 1986, Maxey was appointed as a staff surgeon at the VA Medical Center in Big Springs, Texas. He later transferred to a similar position at the VA facility in Fayetteville, Arkansas, where he was granted clinical privileges in general surgery.

On November 16, 1987, appellee David K. McAfee, chief of surgical services at the Fayetteville facility, issued a directive to all staff surgeons stating that, because of an excessive workload for the medical services department, physicians on the surgical staff would be temporarily assigned primary responsibility for the care of certain medical services patients. Maxey objected, arguing that the assignment would violate medical ethics and VA bylaws.

Maxey was subsequently advised in writing that his reasons for failing to comply were not valid. Maxey's counsel then drafted a legal opinion for Maxey which concluded that, although Maxey would face no malpractice liability by complying with McAfee's directive, the directive appeared to violate ethical standards. Copies of the opinion were sent to the VA district counsel as well as Maxey's congressman and senators. After being warned in writing by McAfee

regarding his refusal to accept medical services patients, Maxey was reprimanded for insubordination by appellee Dan G. Kadrovach, medical center administrator, when Maxey continued to refuse to accept medical services patients. Maxey then requested a conference with Kadrovach.

On December 15, 1987, Maxey was notified that a Physicians Professional Standards Board (Board) would be convened on December 30, 1987, to conduct a summary review of his probational appointment and make a recommendation to Kadrovach. Maxey declined to cancel a vacation to attend, but did obtain permission for a representative to appear on his behalf. On December 29, 1987, at 5:27 p.m., Maxey was notified that because of his probationary status, the determination of the Board would be final without review by Kadrovach. The Board met the following day, considered the evidence presented and determined that Maxey be terminated from his probationary status. Maxey's date of separation from the VA was January 15, 1988.

Maxey filed the instant suit against Kadrovach, McAfee, the VA and the United States, claiming that appellees violated his constitutional rights to free speech and due process (Counts I-IV) and terminated him from employment in an unlawful and arbitrary fashion (Count V). Maxey sought reinstatement, backpay, compensatory and punitive damages, restoration of benefits and expungement of derogatory

references in his personnel record.

Appellees' motion to dismiss Maxey's constitutional tort claims was granted by the district court, relying upon *Bush v. Lucas*, 462 U.S. 367 (1983), and its progeny. *Maxey v. Kadrovach*, 696 F.Supp. 425, 430-33 (W.D. Ark. 1988). Thereafter, the district court entered judgment on behalf of appellees on Maxey's remaining claim under the APA.

Maxey argues on appeal that (1) the termination procedure was unlawful because of the illegality of the November 16 memorandum, improper notice, and the presence on the Board of a prejudiced member; (2) the district court erred in not allowing further discovery to supplement the record; (3) he was entitled to the statutory termination procedures due a nonprobationary rather than a probationary physician; and (4) the district court erred in dismissing his constitutional tort claims.

If Congress has not explicitly created a direct action for constitutional violations by federal officials or employees, and if it has created other remedies to vindicate (though less completely) the particular rights asserted, a federal court will not recognize a constitutional tort claim unless Congress' omission was inadvertent. *McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988) (citing *Schweiker v. Chilicky*, 108 S.Ct. 2460, 2468 (1988)). A VA probationary physician who is

discharged in alleged violation of the Constitution may appeal that agency decision to a federal court under the APA to gain redress, albeit limited in nature. *Franks v. Nimmo*, 796 F.2d 1230, 1239-40 (10th Cir. 1986). Maxey thus has no right to pursue constitutional tort claims against his supervisors.[2] *See id.; McIntosh*, 861 F.2d at 526. Accordingly, the district court correctly dismissed Maxey's *Bivens*[3] claims.

In reviewing a district court's entry of judgment on an APA claim, an appellate court " 'must render an independent decision on the basis of the same administrative record as that before the district court.' " *Brown v. United States Dep't of Interior*, 679 F.2d 747, 748-49 (8th Cir. 1982) (quoting *First Nat'l Bank v. Smith*, 508 F.2d 1371, 1374 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975)). A reviewing court must set aside any agency action found to be arbitrary, capricious, an abuse of discretion, short of statutory right or without observance of procedure required by law. 5 U.S.C. §706.

We reject Maxey's contention that he was not a probationary employee and thus was entitled to

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[2]Contrary to Maxey's argument, the Health Care Quality Improvement Act, 42 U.S.C. §§11101-11152, is inapposite to his claims because it applies to the discharge of incompetent, not insubordinate, physicians. Even if the Act applied to the latter, it cannot be read to create a direct action for constitutional violations by members of the VA peer review board.

[3]Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

statutory termination procedures due a nonprobationary physician, despite an ambiguity of the personnel forms.[4] Title 38 U.S.C. §4106(b) "unequivocally requires" that physicians appointed under §4104 serve a two-year probationary period. *Franks*, 796 F.2d at 1235. Title 38 contains no authority for the VA to waive the probationary period; thus it had no discretion regarding whether to waive a "trial period." Maxey's treatment by the VA as a probationary physician was correct.

Maxey argues that his termination by the VA was unlawful because the memorandum directing surgeons to provide primary care to medical services patients violated VA bylaws. We disagree. Article III, section 6 of the bylaws states that in an emergency where a qualified professional staff member is not available, a specialist may be called upon for assistance and temporary staff privileges granted. If Maxey believed that he did not have the expertise to treat a particular medical services patient, he could have requested consultative assistance. Moreover, he had treated medical services patients when assigned Officer of the Day duty.

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[4]The appendix supplied to the court indicates that Maxey was initially hired by the VA Medical Center in Big Springs, Texas, as a staff surgeon in a "full time permanent, excepted" position, pursuant to 38 U.S.C. §4104(1). The appointment is noted to be subject to a two-year probationary period commencing "*00-00-00." A personnel notice to employees states that "[a] trial period may be required at the discretion of the employing office."

Maxey also argues that his termination was unlawful because he received inadequate notice. Specifically, he contends that the amended notice he received at 5:27 p.m. on December 29, 1987, informing him that the Board's decision was to be final instead of recommendatory, was not adequate because the hearing was scheduled for the following morning.

The VA's regulations require that probationary physicians be provided written notice of the Board's purpose in meeting. Department of Medicine and Surgery Supplement, MP-5, pt. II, ch. 4, §4.06(b). Here, despite the short notice given of the change in the Board's function, Maxey's ability to prepare for the hearing was not impaired. He had two weeks notice of the subject matter of the hearing, was waiting for an appointment with Kadrovach to discuss the same issues, had already retained legal counsel and had obtained a representative to appear on his behalf before the Board. Therefore, the notice to Maxey of the Board's revised purpose was not inadequate.

Maxey next argues that Board member Dr. John G. Bergstrom was not an impartial decisionmaker because he was appointed by McAfee and was also involved in the decision to have surgical services assist in alleviating the medical services workload. Maxey claims that Bergstrom's participation violated VA procedure.

"Persons in a position to prejudice the action

of the board may not serve as members of the board conducting the review." *Id.* §4.06(c)(9). However, allegations of misconduct, bias or prejudice by Board members must be specific, not general, in order to establish the denial of a neutral and detached tribunal. *Gilbert v. Johnson*, 419 F.Supp. 859, 871 (N.D. Ga. 1976), *aff'd in relevant part*, 601 F.2d 761 (5th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). The fact that McAfee appointed Board members is insufficient to establish bias. *See id.* Moreover, the fact that Bergstrom participated in the preparation of the November 16 memorandum did not disqualify him because there was no showing that Bergstrom had any "personal animus or ill will" towards Maxey. *Klinge v. Lutheran Charities Ass'n*, 523 F.2d 56, 63 (8th Cir. 1975).

Maxey's final argument is that the district court erred in refusing to allow discovery and supplementation of the administrative record. A federal court is confined to the administrative record in deciding an appeal under the APA, *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), unless the plaintiff can make a "strong showing of bad faith or improper behavior." *Corning Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 736 F.2d 479, 481 (8th Cir. 1984).

Maxey contends that he made a sufficient showing to overcome the general rule disallowing discovery by citing (1) the short notice provided him of

the Board's decisonmaking, not recommendatory, function; (2) the uncertainty as to whether one member of the Board had any knowledge of the VA bylaws; (3) the placement of Bergstrom on the Board as chairman by McAfee; and (4) McAfee's false testimony that the reprimand preceded Maxey's failure to treat a patient. We find that the evidence regarding these allegations of misconduct falls short of the strong showing of bad faith or improper behavior necessary to permit discovery and supplementation of the administrative record. With respect to Maxey's final allegation, the record does reflect that the reprimand was received by Maxey after, not before, he refused to treat a patient on December 12, 1987. However, even without this erroneous testimony, there is sufficient evidence on the record to find that the Board's action was rational and thus was neither arbitrary nor capricious. *See id.* at 480-81.

Accordingly, we affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civ. No. 88-5034
The United States of America *Defendant*

JUDGMENT

On this 11th day of May, 1989, came on for consideration the above-entitled matter initiated pursuant to 5 U.S.C. §701 *et seq.* From review of the administrative record as supplemented by the parties, the court finds and concludes that defendant, United States of America, is entitled to judgment and that the complaint of the plaintiff, E. Stanton Maxey, M.D., should be and hereby is dismissed with prejudice for the reasons set forth in the court's memorandum opinion filed concurrently herewith.

IT IS SO ORDERED.

H. FRANKLIN WATERS
United States District Judge

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civ. No. 88-5034
The United States of America *Defendant*

MEMORANDUM OPINION

The plaintiff's allegations giving rise to the instant claim are detailed in the court's memorandum opinion dated October 13, 1988, *Maxey v. Kadrovach*, 696 F.Supp. 425 (W.D. Ark. 1988), and will not be repeated herein except as pertinent to the court's discussion. Currently pending are plaintiff's motions to augment or supplement the administrative record. The United States does not object to the court's consideration of the documents to which plaintiff refers in his motions and those documents will, accordingly, be considered. To the extent that plaintiff seeks to further supplement the record and to conduct additional discovery, plaintiff's request will be denied.

Remaining in this action for consideration is Count V of plaintiff's complaint, as amended. Count V arises solely under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* Both parties acknowledge that the well-settled general rule is that the court is confined to the administrative record in deciding an appeal under

the Act. *See Arkla v. Texas Oil & Gas*, 734 F.2d 347 (8th Cir. 1984). As *Arkla* makes clear, there are certain well-defined exceptions to the general rule, none of which appear to have any applicability here.

Plaintiff suggests that the decision of the Veteran's Administration (VA) to terminate him was improperly made and implemented, and then followed by "kangaroo court" procedures to provide some "semblance of propriety." The court understands plaintiff to argue that the VA acted in bad faith, and that specific facts demonstrating this are, therefore, subject to discovery and consideration by the court.

The "bad faith" exception is extremely narrow, requiring a strong showing of improper behavior. *See Corning Sav. & Loan Assn. v. Fed. Home Loan Bank*, 736 F.2d 479 (8th Cir. 1984). Inquiry into the mental processes of administrative decision-makers is usually to be avoided. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The reason for this is self-evident. Under the APA the court is limited to determining whether agency action is arbitrary, capricious, an abuse of discretion, contrary to the constitution or statutory right, or violative of procedural due process. 5 U.S.C. §706(2). To contend that "bad faith" played a role in an administrative decision is, in essence, to assert that even if there is sufficient objective support for the administrative decision, the objective evidence was not the true reason for the termination.

Plaintiff has contended, from the outset, that he was terminated as a proximate result of his having engaged in constitutionally-protected conduct. It follows that if plaintiff was constitutionally entitled to engage in the conduct forming the basis of his termination, that conduct may not form the basis of a valid termination. If plaintiff was so entitled, then the sole question is whether the administrative decision is sufficiently supported by the record. Nowhere in this framework is there "room" for an assertion that a purported basis for plaintiff's termination was not, in fact, the "real" reason. As the court views the matter, the sole issue presented is whether the plaintiff was entitled to engage in the actions which formed the basis of his termination, and if such conduct is not constitutionally protected, whether the administrative decision is arbitrary, capricious or was an abuse of discretion.

The administrative record contains numerous documents. The dispute between plaintiff and the VA, as noted in the court's prior memorandum opinion, arose from plaintiff's belief that he was entitled to refuse to accept responsibility for "medical" patients and instead, would accept responsibility only for "surgical" patients.

Plaintiff, with or without advice from counsel, astutely attempted to "balloon" the controversy into one involving his first amendment rights of free speech. This claim involved letters written to various

governmental personnel, including a senator and a congressman, critical of the VA's policy at issue. However, even if a termination because of such conduct is actionable in some form (see this court's prior memorandum opinion), the court specifically finds absolutely no basis in the record for the contention that the letters motivated, even in part, the VA's employment decision at issue herein. The record shows that it was plaintiff's *conduct* (in refusing to treat patients) that the board found warranting of disciplinary measures, not plaintiff's *speech* in writing letters or speaking critically of the VA policy which prompted this confrontation.

The first document evidencing this conflict is a medical record dated December 12, 1987, wherein plaintiff wrote on a patient's chart, "Trans to med. or re-assign as Dr. Maxey does not accept responsibility for care of medical patients. E. Maxey." A "Report of Contact" executed by David McAfee on December 13, 1987, reflects that plaintiff was given a letter of reprimand for this conduct and his previously expressed intention to engage in this conduct. According to the report, plaintiff said he would fight it "to the end" and would continue to refuse to see medical patients.

Next included in the record is a document reflecting a change in the membership of the Professional Standards Board because of the involvement of several members of the board in plaintiff's actions.

The record reveals that on December 15, 1987, a letter was written to the plaintiff advising him that the board was scheduled to conduct a "summary review" of his probational appointment on December 30, 1987, at 9:30 a.m. This letter detailed the alleged deficiencies and summarized the facts leading to the review. These facts included that a November 16, 1987, memorandum from the Chief of the Surgical Service instructed the plaintiff to provide care and assume responsibility for medical service patients. Plaintiff, in a written statement dated November 17, 1987, and in conversation with the Chief of the Surgical Service, refused to follow this directive. Accordingly, a letter or reprimand dated December 10, 1987, was issued to the plaintiff.

The letter reiterated evidence to be considered by the board, including the plaintiff's written notation on the chart mentioned above and plaintiff's stated intention in conversation with the chief of the surgical service on December 13, 1987, to continue to refuse to see medical patients. The letter stated why these acts were felt to justify review, i.e. the acts violated 38 C.F.R. §820. The letter informed the plaintiff of the procedures under which the review was to be conducted: "under the provisions of 38 U.S.C. §4106(b), and in accordance with DM & S Supplement, MP-5, Part 11, Chapter 4." The letter stated the purpose of the review: "to conduct an impartial review and make recommendations to the appropriate approval authority whose

decision is final." Plaintiff was informed that he could appear and present evidence and argument with union representation and assistance.

The record contains plaintiff's December 19, 1987, letter to Dan Kadrovach in which plaintiff referred to the absolute corruption of absolute power and the inevitability of divine justice. Plaintiff also referred to the lack of surgical skills by medical practitioners and the lack of medical skills by surgical practitioners as being the bases for his conduct. A December 20, 1987, letter from plaintiff to John Bergstrom, Chairman of the Ad Hoc Standards Board, sets forth plaintiff's belief that he was not a probationary employee. This letter also contains plaintiff's contention that the bylaws authorized him to refuse to see medical patients. The letter concludes with plaintiff's pronouncement that he chose to absent himself from the review hearing because of a previously scheduled vacation.

Plaintiff's representative, Gary Blevins, requested by letter dated December 24, 1987, that the review be rescheduled, however, it was not. Plaintiff was notified by letter dated December 29, 1987, that because *Giordano v. Roudebush*, 617 F.2d 511 (8th Cir. 1980) held that the findings of a probationary review board are not subject to further review, DM & S Supplement, MP-5, Part 11, Chapter 4 would not apply, contrary to the earlier notification. Plaintiff received this notice on December 29, 1987.

As noted, plaintiff contended that the "bylaws" justified his actions. In plaintiff's December 7, 1987, letter to Dan Kadrovach, plaintiff clarified this position. The "Bylaws, Rules, and Regulations of Medical Staff of Veteran's Administration Medical Center, Fayetteville, Arkansas" of September 28, 1987, under Article 111, Section 2, provide that the medical staff subscribes to the code of ethics of the American Medical Association. Plaintiff then points out that the American Medical Association Principles of Medical Ethics requires that a physician be dedicated to providing competent medical service and shall, except in emergencies, be free to choose which patients to serve.

It thus appears that plaintiff argues that his refusal to treat medical patients was justified by the bylaws because the bylaws refer to the "code of ethics" and the code of ethics requires that physicians be competent and free to choose whom to serve. Essentially, plaintiff posits that the VA had no basis for disciplinary action based on plaintiff's refusal to treat medical patients because plaintiff is not competent to do so and because plaintiff did not want to.

Plaintiff confuses his "rights" as a physician in a free society with his obligations as an employee of the VA. It is true that plaintiff has the "right" to refuse to treat anyone he chooses, meaning that this is a course of action open to him. However, this does not mean that

the VA does not also have a corresponding "right" to consider such a refusal in formulating its employment decisions.

The court does not mean to belittle plaintiff's argument, for it is admirable that plaintiff chooses not to treat those whom he feels not competent to treat. However, it requires a quantum leap in logic to reason that from that proposition flows the conclusion that the VA is legally precluded from considering such a fact in its employment decisions. Certainly the VA is allowed to employ those physicians who do feel competent to treat assigned patients and who will do so, as opposed to those who do not and will not.

The record contains other documents reflecting plaintiff's continued refusal to treat patients in need of care. On December 9, 1987, plaintiff refused to treat Roscoe Anderson. On December 10, 1987, plaintiff refused to accept responsibility for the treatment of Ralph Bunch, Jr. and Ray Adamson. On December 12, 1987, plaintiff wrote in a patient's chart: "will sign off this pt. as I'm not accepting responsibility for care of medical patients."

The record indicates that plaintiff was somewhat overinclusive in the categories of patients he felt incompetent to treat. Plaintiff was assigned a patient who believed he was infected with pubic lice. Plaintiff requested a consultation from the dermatology

department. Dr. McAfee responded by writing on a routing and transmittal slip: "It is my belief that any physician can diagnose and treat crabs. . . ."

A December 16, 1987, memorandum to the Medical Center Director from Dr. McAfee, Acting Chief of Staff, fairly in the court's view, summarizes the situation and the evidence:

> 1. Due to the shortage of physician personnel on the Medical Service, assistance of the Surgical Service was requested by the Chief of Medical Service. It was requested that we loan them a physician for several weeks. . . . This was discussed with the Surgical Service staff and all agreed to cheerfully perform this service except for (plaintiff).
>
> * * *
>
> 4. On November 17, 1987, (plaintiff) had responded in writing that he would not assume care of any medical patients partly because of possible malpractice exposure and also because internal medicine was not his field of expertise. . . . I explained to (plaintiff) that this is not internal medicine, it is general medicine, and all general surgeons are qualified in this area. . . .

* * *

> 9. Because of (plaintiff's) refusal to cooperate, and Dr. Brannon's absence due to illness, it was felt that the Surgical Service did not have enough staff to continue to routinely accept medical service patients and this procedure was discontinued. . . .

* * *

> 10. [I]n fairness to (plaintiff) . . . he has stated at various times that he would see these patients if I re-assigned them to Surgical Service and if I changed the wording of my original memorandum. At the outset, three patients were in fact transferred to the surgical service and appropriately cared for by (plaintiff).

This memorandum seems to indicate that plaintiff refused the care of various patients not on grounds of competency, but on principle. The Ad Hoc board seriously considered plaintiff's competency argument and found:

> [I]n November, 1987, because of an extremely heavy Medical Service patient load, the Surgical Service Chief, Dr. David McAfee, agreed to help with these patients. It was understood that at any time a physician felt uncomfortable with

> a patient's 'Diagnosis and/or Treatment,' consultation would be made with the Medical Service and the patient's care would be looked after—either on a consultation basis and/or complete takeover of the patient's care by the Medical Staff.
>
> * * *
>
> It is duly noted that (plaintiff) had done general medical duties on the Surgical Service prior to this time, by taking care of patients with general medical problems. . . .

The board found plaintiff to have been insubordinate and that plaintiff was unreasonable and obstructive. The challenged directive requiring assistance from the surgical service was found to be reasonable and appropriate in its scope and nature. As a result, plaintiff was notified of his separation from service effective January 15, 1988.

If, in fact, plaintiff had been forced to treat patients without assistance in an area of specialty foreign to his, the court would be confronted with a much more troubling, and distinctly different, issue. The fact is that there is simply no support in the record that that occurred. The record amply demonstrates that plaintiff was asked to provide needed assistance in the area of general medicine with available consultation and support

from the medical service staff as needed. Thus, any danger of plaintiff's being solely responsible for a patient requiring medical care involving expertise and training above or different from that possessed by the plaintiff was minimal, if not entirely nil. Plaintiff implicitly recognized this when he stated that his primary objection was that the directive at issue be worded differently or that the patient involved be transferred to the surgical service. It is not contested that plaintiff had treated medical patients without incident prior to November, 1987.

In November, 1987, plaintiff objected to the VA's solution to a problem confronting it. The VA proposed a plan which would provide medical care to medical patients in need of such care. From the record, it appears that the VA was confronted not with a choice between adequate and inadequate care for medical patients, but rather between providing care to medical patients in the best manner possible and providing no care at all to some patients. The challenged directive was narrowly tailored in scope with sufficient protections to ensure quality treatment of medical patients.

The procedure employed by the VA was fair. It provided the plaintiff full, timely, and explicit notice of the basis for the disciplinary hearing, the possible results of such a hearing, and the procedures to be utilized. Plaintiff was allowed representation and an opportunity to submit anything he chose for consideration by the

review board. Plaintiff was given ample opportunity to cease the conduct of which the VA complained prior to the convening of the review board.

Suffice it to say that the court finds ample support in the record as supplemented to justify the action of the VA in terminating the plaintiff's probationary employment. Accordingly, defendant is entitled to judgment and plaintiff's complaint will be dismissed with prejudice.

A separate judgment in accordance with the above will be concurrently entered.

Dated May 11, 1989

H. FRANKLIN WATERS
United States District Judge

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civil No. 88-5034
Dan G. Kadrovach, et al. *Defendants*

ORDER

On this 12th day of October, 1988, for the reasons set forth in a memorandum opinion filed contemporaneously herewith, the court finds that plaintiff's claims set forth in Counts I through IV of his amended complaint should be, and they hereby are dismissed.

IT IS SO ORDERED.

H. FRANKLIN WATERS
United States District Judge

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civil No. 88-5034
Dan G. Kadrovach, David K. McAfee, M.D.
and The Veterans Administration, An Agency
of the United States of America, and
the United States of America *Defendants*

MEMORANDUM OPINION

I. Introduction

Pending before the court is the defendant's motion to dismiss plaintiff's amended complaint on jurisdictional grounds, or alternatively for summary judgment. For purposes of the court's discussion of the jurisdictional issues, it is assumed that the pertinent factual allegations of the amended complaint are true.

Plaintiff challenges, on several grounds, his termination from his employment as a probationary staff surgeon at the Veterans Administration Medical Center in Fayetteville, Arkansas. The jurisdictin of the court is purportedly invoked pursuant to the First and Fifth Amendments to the Constitution of the United States, The Administrative Procedure Act, 5 U.S.C. §701 et seq.,

and 28 U.S.C. §1331.

Plaintiff alleges that he was hired pursuant to authority granted in 38 U.S.C. §4104. From October 26, 1986, to August 3, 1987, plaintiff was employed as a staff surgeon at the Veterans Administration Medical Center in Big Springs, Texas. On August 3, 1987, plaintiff accepted an identical position with the VA facility in Fayetteville, Arkansas.

On November 16, 1987, defendant, McAfee, then serving as Chief of the Surgical Service, issued a memorandum to all staff surgeons providing, *inter alia*, that, because of an excessive workload for the department of medicine, members of the surgical staff would be assigned responsibility for the care of medical patients in addition to those surgical patients for which the surgical staff was traditionally responsible. Plaintiff objected orally and in writing to defendant, McAfee, ostensibly on the basis that the treatment of medical patients by the surgical staff would violate medical ethics and cause the quality of care accorded such patients to deteriorate.

On November 19, 1987, the acting chief of staff confirmed in writing the directives of the previous memorandum, and defendant, McAfee, supplemented this confirmation with a written opinion of the district counsel for the Veterans Administration to the effect that the plaintiff's reasons for failure to comply with the

directive were not valid.

On November 23, 1987, at plaintiff's request, plaintiff's counsel drafted a legal opinion as to the plaintiff's potential liability for malpractice which, although stating that the plaintiff was "exempted" from malpractice liability under the Federal Tort Claims Act, clearly indicated that the Veterans Administration policy to which plaintiff had objected violated the standard of care owed by the government to its disabled veterans. Copies of counsel's letter were sent to a congressman, two senators, and district counsel for the Veterans Administration.

Plaintiff was subsequently reprimanded by defendant, Kadrovach, for refusing to follow the instructions of defendant, McAfee. One day prior to the delivery of the reprimand, plaintiff, while making his rounds, wrote on a patient's chart that the plaintiff "does not accept responsibility for care of medical patients."

On December 15, 1987, plaintiff was notified that a Physician's Professional Standards Board would be convened to conduct a summary review of his probational appointment. The review was provided on December 30, 1987, resulting in the plaintiff's notification of his termination effective January 15, 1988.

In his amended complaint, plaintiff attempts to set forth five separate claims for relief. In Count I,

entitled "Constitutional Tort—Infringement of Free Speech by Individual Named Defendants," plaintiff essentially alleges that his protestations and conduct in refusing to assume responsibility for medical patients constitute protected expressions on matters of legitimate public concern and that the actions of defendants, McAfee and Kadrovach, in reprimanding and dismissing him violated his First Amendment rights. In Count plaintiff requests back pay, front pay, compensatory damages, and punitive damages from the separate defendants.

Count II is entitled "Constitutional Tort—Deprivation of Property Without Due Process by the Individual Defendants." In Count II, plaintiff alleges that his "profession as a surgeon constitutes a valuable property right" and that the separation of the plaintiff thrugh the actions of the individual defendants constitutes a deprivation of the plaintiff's property rights without due process for which the plaintiff alleges he is entitled to compensation.

Count III, termed "Constitutional Tort—Infringement of Free Speech by the United States of America," is, in essence, a restatement of Count I, substituting the United States as the offending party with an additional request for reinstatement.

Similarly, Count IV duplicates Count II replacing the averments against the individual

defendants with averments against the United States for which plaintiff suggests that he is entitled to reinstatement, a "clearing" of his employment record, and compensatory relief.

Count V purportedly arises under the Administrative Procedure Act. Plaintiff submits that his termination was "unlawful, arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, contrary to constitutional right, short of statutory right and without observance of procedure required by law. Plaintiff asserts that this entitles him to reinstatement, expungement of derogatory references in his record, and reimbursement of "current and past pay and benefits."

Defendants timely filed a motion to dismiss or alternatively for summary judgment arguing that (1) the Veterans Administration is not a suable entity *eo nomine;* (2) plaintiff's constitutional claims against the individual defendants (Counts I and II) are precluded because Congress has enacted an alternative remedy and "special factors" counsel against following such constitutional claims; (3) the individual defendants are immune from suit; (4) plaintiff cannot substantiate his First Amendment claim; (5) neither a liberty nor property interest are implicated by plaintiff's dismissal, and (6) procedural due process was observed in plaintiff's termination. With regard to the constitutional claims against the United States of America, defendants

assert that "because plaintiff's claims are essentially for monetary damages over $10,000, exclusive jurisdiction is in the Court of Claims. . . ."

II. Discussion

(a) The Tucker Act

Neither party mentioned the obvious jurisdictional issue pertaining to the exclusive of concurrent jurisdiction of the Court of Claims until the court raised the issue *sua sponte.* By letter dated July 21, 1988, the court requested counsel to brief the following three issues: (1) Does the court have jurisdiction of all or any portion of this case, or does the Tucker Act, 28 U.S.C. §1491 place exclusive jurisdiction in the Court of Claims? (2) if the court decides that it does not have jurisdiction of the back pay claims or other claims for damages, but does have jurisdiction to decide the equitable claims, does the court have discretion to transfer the entire matter to the Court of Claims? (3) if the court has jurisdiction to try part of the lawsuit, but not all of it, and has discretion to transfer the matter to the Court of Claims under those circumstances, should it?

The requested briefs have been received and reviewed by the court. From the briefs, it is apparent that the parties agree on the following propositions: (1) the Court of Claims has no jurisdiction over the claims

against the individual defendants; (2) this court has jurisdiction to grant the declaratory and injunctive relief sought against the United States if that is the "primary" relief sought; and (3) this court does nt have jurisdiction to award monetary damages against the United Sttes.

The Tucker Act, 28 U.S.C. §1491, provides the basic jurisdiction of the Court of Claims. That statute provides, *inter alia*, as follows:

> (a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded upon either the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * * *
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records and such orders may be issued to any appropriate official

> of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any adminsitrative or executive body or official with such direction as it may deem proper and just.
>
> * * * * *

However, the Claims Court also has jurisdiction concurrent with that of the district courts in other civil actions or claims against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. §1346.

As noted, because the Court of Claims generally may only assume jurisdiction of claims against the United States, no issue arises under the Tucker Act as to plaintiff's claims against the individual defendants. This court's jurisdiction of such claims must stand or fall on other grounds and will be discussed *infra*.

In *Giordano v. Roudebush*, 617 F.2d 511 (8th Cir. 1980), the court was presented with a similar fact-situation. In that case Giordano was discharged as assistant chief of urology from the Veterans Administration hospital where he had been serving as a

probationary employee. The proffered reason for Giordano's termination was his failure to perform satisfactorily. Giordano challenged his dismissal in federal district court. The district court ultimately held that it did not have jurisdiction to award back pay in excess of $10,000 and ordered the entire damage claim transferred to the Court of Claims. The district court found, however, that Giordano's initial discharge was arbitrary and capricious and ordered Giordano's reinstatement.

On appeal, the Court of Appeals for Eighth Circuit held that, where the plaintiff's claims are primarily nonmonetary, the district court may assume jurisdiction of the nonmonetary claims. In *Giordano*, defendants argued that *Polos v. United States*, 556 F.2d 903 (8th Cir. 1977) dictated that the entire cause be decided by the Court of Claims. However, the court found *Polos* to be distinguishable because it was evident that in *Polos*, the plaintiff's principal claims were for back pay and participation in the Civil Service Retirement Program:

> *Polos' claim, then, is essentially one against the United States for the payment of damages.* Such a claim, when in excess of $10,000, is within the exclusive jurisdiction of the Court of Claims. *Polos* at 905 (emphasis added (footnote omitted).

> In contrast to Polos, Dr. Giordano has stated from the outset of this case that his claims are primarily nonmonetary.

Giordano at 515.

Thus, counsel are correct in their statements that, to the extent that plaintiff seeks monetary relief in excess of $10,000 on claims "not sounding in tort," ths court lacks jurisdiction of the same. The question remains, however, whether this court may assert jurisdiction of plaintiff's nonmonetary claims.

It appears, from *Polos* and *Giordano* that if plaintiff's claims may properly be characterized as "primarily nonmonetary," this court may exercise jurisdiction to decide the nonmonetary claims. In *Giordano*, the Eighth Circuit held that the plaintiff's claims in *Polos* were essentially for the payment of damages while the plaintiff's claims in *Giordano* were characterized as "primarily nonmonetary."

In *Polos*, the court stated:

> It is evident that Polos' principal claims are for back pay (an amount found to be $79,939.36) and for participation in the Civil Service Retirement program. While Polos contends he was entitled to reinstatment, he concedes that he could not retain the civilian technician

> position, because he is no longer a member of the Arkansas Air Naitonal Guard. See 32 U.S.C. §709(b). He does not seriously dispute that, even if reinstated, he could be discharged on thirty days' notice. 32 U.S.C. §709(e)(6).

Polos at 905.

In *Giordano*, however, the plaintiff stated from the outset that his claims were primarily nonmonetary. Giordano sought reinstatement and a "clearing" of his name. The court in *Giordano* found that when Giordano's suit was first filed his back pay claim was worth only $6,000 and that monetary relief was "clearly not his principal motive." *Giordano* at 515.

In the instant case, plaintiff seeks both monetary and nonmonetary relief. In Count III, plaintiff alleges that the actions of the United States caused "damages to Dr. Maxey in the amount of compensation he has lost pending date of trial, public embarrassment and any compensation he can prove lost as the result of future lack of employment." Plaintiff's amended complaint, p. 20. Plaintiff further alleges that "Dr. Maxey is entitled to reinstatment to his position, . . . expungement of the records . . . and any compensation due him pending reinstatement, as well as punitive damages . . . in the amount of one million dollars. . . . "

In Count IV, plaintiff stated that he is

"entitled to be reinstated . . . , his record cleared . . . and to be reimbursed all compensation which he has lost as a result of [his] separation." Plaintiff's amended complaint, p. 21.

In Count V, based upon the APA, plaintiff asserts that Dr. Maxey is entitled to "reinstatement as a staff surgeon . . . , deletion of all derogatory references in his record . . . and reimbursement to him of all current and past pay and benefits." Plaintiff's amended complaint, p. 22.

In light of governing case law, plaintiff's counsel quite naturally argues that the plaintiff's primary concern vis a vis the government is that he be reinstated to his position. To the extent that counsel for the plaintiff bases his argument upon plaintiff's subjective "concern," such an argument is immaterial.

In *Minnesota ex rel. Noot vs. Heckler,* 718 F.2d 852 (8th Cir. 1983), the Eighth Circuit, in addition to noting a decided split of authority on the Tucker Act issue, stated clearly that "[c]laims essentially seeking monetary relief over $10,000 fall within the Claims Court's exclusive jurisdiction which may not be evaded by framing a claim for injunctive relief or by requesting the exercise of mandamus jurisdiction." *Minnesota ex rel. Noot* at 859, n.12. The court indicated that, when the injury can be redressed fully by an award of damages, the claim is properly characterized as monetary. Similarly,

where declaratory relief would simply establish plaintiff's legal entitlement to the principal remedy, it is the primary focus of the principal remedy sought which controls. *Minnesota ex rel. Noot* at 859, n.13. This means simply that if the declaratory or injunctive relief sought has "significant" prospective effect or considerable value apart from merely determining monetary liability, the equitable relief sought is paramount and the district court may assume jurisdiction over the nonmonetary claims. *See Minnesota ex rel. Noot,* at 858 n.11.

It would have been helful for this court to have been made aware of the amount of back pay involved in plaintiff's claim, as well as his current employment status. There are factors considered by courts in determining the "significance" of the prospective effect or value of the declaratory or injunctive relief sought. See *Giordano,* at 515; *Polos* at 905; *Minnesota ex rel. Noot* at 858-60; *Keller v. Merit Systems Protection Board,* 679 F.2d 220 (11th Cir. 1982) at 223.

Without belaboring the point further, it appears to the court that the equitable relief sought by the plaintiff in this case has "significant" prospective effect or "considerable" value apart from any monetary liability of the government. As such, the equitable relief sought may fairly be considered "paramount" under the law in this circuit and this court may, therefore, assume jurisdiction of plaintiff's nonmonetary claims. *Giordano,*

supra; Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1983); *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980) *cert. denied* 561 U.S. 970 (1981).

(b) The Bivens Claims

The next issue requiring the court's attention is whether the court may imply a *Bivens*-type action against the United States or its officers based upon the alleged violation of plaintiff's First and Fifth Amendment rights. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The primary obstacle to such actions against the federal government or its employees is *Bush v. Lucas*, 462 U.S. 367 (1983), and its progeny. In *Bush*, the Supreme Court held that a *Bivens* action is not to be implied if Congress has developed a comprehensive remedial system for the redress of a plaintiff's grievances or if "special factors" exist which counsel against such an implication.

Bush was discussed in *Premachandra v. United States*, 739 F.2d 392 (8th Cir. 1984). In that case, the Eighth Circuit concluded that Congress intended the civil service laws to provide the sole remedy for a wrongfully discharged Veterans Administration nonprobationary physician. However, as a nonprobationary employee, Premachandra was held to be entitled to challenge the termination decision in inter-agency proceedings, appeal to the Merit Systems Protection Board, and seek revied in the Federal Court

of Appeals. *See* 5 U.S.C. §§7513, 7703.

More on point is *Franks v. Nimmo*, 769 F.2d 1230 (10th Cir. 1986). In that case, Franks, a discharged probationary associate chief of staff for research at a Veterans Administration hospital, sought damages for the alleged deprivation of his First and Fifth Amendment rights. The Tenth Circuit concluded that the *Bivens* action was barred by the rationale applied in *Bush*. The plaintiff had argued that, because he was not a civil service employee and lacked the comprehensive administrative review rights of such employee, *Bush* was inapplicable. The Tenth Circuit noted that the same argument was presented by a VA physician and rejected in *Heaney v. United States Veteran Administration*, 756 F.2d 1215 (5th Cir. 1985). In *Franks* the court stated:

> A probationary VA physician who is separated from service under [38 U.S.C.] section 4106 may obtain judicial review of the administrative decision [citing *Giordano* and *Heaney*]. Such an administrative decision is a final agency action which may be appealed to a federal court pursuant to the Administrative Procedure Act. Under the Act, the administrative decision may be set aside if it is arbitrary or capricious, 5 U.S.C. §706(2)(A) (1982), or unconstitutional, *Id.* §706(2)(B); *Stretton v. Wadsworth Veterans Hospital*, 537 F.2d 361, 369 n. 19 (9th Cir. 1976). A physician who has been wrongfully

> discharged may obtain judicial relief in the form of reinstatement and back pay. . . . In addition, the court has power to grant interim equitable relief. . . . As in *Bush*, a plaintiff such as Dr. Franks has a forum in which to present constitutional claims, may receive judicial review of the administrative proceedings, and may obtain meaningful relief in the form of reinstatement and back pay.

Franks at 1239-40.

Although the VA physician in *Heaney* was not a probationary employee, the discharged VA physician in *Franks* was. Further in *Heaney*, the Fifth Circuit reasoned:

> Heaney asserts that *Bush* is inapposite to the present case because *Bush* held that a damages claim is precluded only where the alternative remedy available is meaningful; Heaney asserts the limited relief available under the DMS—in his case limited to reinstatement—is not meaningful redress for the violation of his first and fifth amendment rights. However, the remedy here certainly cannot be considered as meaningless as Heaney maintains; the above-quoted passage from *Davis* suggests that a scheme which provides for reinstatement offers an adequate measure of relief. This is entirely

> consistent with the often restricted availability of damages as opposed to equitable relief against governmental bodies under federal law. *See Bush* 103 S.Ct. at 2409 n. 12 [collecting cites]. In the present case, DMS regulations provide for reinstatement and other relief where an adverse personnel decision is found to be unconstitutional. Thus, the DMS system provides a measure of relief. This is enough to preclude a damages remedy.

Thus, the fact that relief was limited to reinstatement was found by the court to be insufficient to evade the application of *Bush*, barring the *Bivens* claim. That reinstatement is a sufficiently "meaningful" remedy is buttressed somewhat by cases of the Supreme Court which have allowed reinstatement as a remedy for constitutional violations but disallowed, in those case, damages to the injured employee on the basis of qualified immunity. See *Davis v. Sherer*, 468 U.S. 183 (1984). The issue in *Davis* was different from the one presented here, i.e. whether a *Bivens* claim should be implied at all, however, as the *Heaney* court noted, such cases suggest that a scheme affording reinstatement offers an adequate measure of relief.

This court would be more reluctant to accept the *Franks* rationale had the Supreme Court not recently expanded the "special factor" exception. In *Schweiker v. Chilicky*, No. 86-17681, 56 U.S.L.W. 4767 (U.S. June 24,

1986), plaintiffs brought *Bivens* claims against the Secretary of Health and Human Services, contending that they were denied due process as a result of the defendant's denial of Social Security benefits. The Supreme Court held that the continuing review statutes were a "special factor" precluing a *Bivens* action notwithstanding that only past-due benefits could be awarded under the statutes and compensatory damages were unavailable. Although this, in itself, is not particularly instructive the court stated that the special factor exception properly induces "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." The court added that:

> When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the court of its administration, we have not created additional *Bivens* remedies.

Chilicky at 4770.

Plaintiff argues that, although non-probationary physicians of the VA enjoy sufficient protection of their First and Fifth Amendment rights via the various levels of appeal and due process, this is simply not the case with respect to a probationary employee.

The Eighth Circuit recently addressed the *Bivens*-preclusive effect of *Bush*. In *McIntosh v. Weinberger*, 810 F.2d 1411 (8th Cir. 1987), the court stated:

> The administrative remedy that was available to contest the demotion in *Bush*, an appeal to the Merit Systems Protection Board under 5 U.S.C. §§7512 and 7513, is not available here, because Turner's actions are not covered by this procedure. . . .
>
> * * * * *
>
> . . . Turner also suggest that he may have engaged in a prohibited personnel practice actionable by the Special Counsel of MSPB under 5 U.S.C. §1206. Moreover, even if we assume this to be true . . . the MSPB is authorized to take disciplinary action against Turner, but not to award any affirmative relief to the injured employee. 5 U.S.C. §1207(b). This is not adequate to bar a *Bivens* action. . . . We conclude with the District Court that the 'plaintiffs are without redress as to defendant Turner's actions in the absence of a constitutional remedy' . . . and therefore that their *Bivens* action is not barred by *Bush*.

McIntosh at 1435-36.

Thus, in *McIntosh*, plaintiffs were in a "damages or nothing" situation wherein a majority of courts have implied a *Bivens* action.

Further, although the limited protection afforded a probationary physician in the employ of the Veterans Administation may or may not, in this court's opinion, constitute a comprehensive plan by Congress substituted for the constitutional rights that a federal employee normally has, the Eighth Circuit has unambiguously declared that:

> The limited board review of a probationary physician's professional competency is the only procedure available to him. As discussed, in contrast to the plenary hearing in the case of a tenured employee required under [38 U.S.C.] §4110, a probationary physician is entitled to only a summary procedure. He is not entitled under the statutory scheme to any review of the Board's disciplinary action. Thus, our analysis, contrary to defendant's, is that *Congress intended the tenured employee to be given greater rights than a probationary employee.*

Giordano at 517 (emphasis supplied).

Of cases holding that a *Bivens* action should

be available to probationary federal employees challenging adverse personnel decisions, *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986) is typical. *Kotarski*, however, was vacated by the Supreme Court on June 27, 1988, for reconsideration in light of *Chilicky*. *See Cooper v. Kotarski*, No. 1813, 101 L.Ed.2d 897 (U.S. June 27, 1988). Thus, the Supreme Court has indicated that the *Bivens* claims asserted by the plaintiff in this case may be governed by *Chilicky*, and if indeed it is, then *Bush* precludes such an action. The court notes that the dissent in *Kotarski* forefully argued without reference to *Chilicky* that *Bivens* actions are unavailable to probationary federal employees insofar as adverse personnel decisions for the basis of the constitutional claims asserted. *See Kotarski* at 1351 (Hall, J., dissenting). This court concludes, as the Supreme Court has suggested, that *Chilicky* supplements and reinforces the reasoning of the *Kotarski* dissent and that analysis is adopted herein.

The court concludes that the remedies available to the plaintiff are meaningful and constitutionally adequate, even if not as extensive as those available to a nonprobationary employee. *Giordano* indicates clearly that "congressional inaction has not been inadvertent" in this area and that "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *See Chilicky* at 4770.

The court is aware that the Court of Appeals for the Federal Circuit has held that the Claims Court does not have jurisdiction to review a probationary employee's dismissal whether based upon allegations of regulatory or statutory violations, or constitutional infringement. *United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983) ("Connolly II"). Plaintiff agrees, in the instant case, that the district court does not have jurisdiction to award money damages or back pay against the United States, and that if the court has any power at all in this matter, it has only "jurisdiction to grant the declaratory and injunctive relief sought by plaintiff against the United States." *See* plaintiff's counsel's letters to the court dated August 8, 1988, and August 3, 1988.

If *Giordano* and *Connolly II* are read together, then it is possible that no court has jurisdiction to award monetary relief with respect to plaintiff's claims. Even if this is the case, however, this does not of itself militate in favor of the availability of a *Bivens* action. In *United States v. Fausto*, No. 86-595 (U.S. Jan. 25, 1988), the Supreme Court held that a suspended employee of the Interior Fish and Wildlife Service could not maintain an action in the Claims Court under the Back Pay Act, 5 U.S.C. §5596, because the comprehensive and integrated review scheme of the Civil Service Reform Act, 5 U.S.C. (1982 Ed. and Supp. IV) "deliberately" excluded employees in Fausto's service category from the provisions establishing administrative

and judicial review for personnel action of the sort at issue. As a result, Fausto was held to have no right to administrative review, nor to judicial review in any court relying on Tucker Act jurisdiction.

Obviously, *Fausto* is a "far cry" from being directly "on point," however it does reflect that, where Congress "intentionally," even by implication, has established limited rights to administrative or judicial review of personnel decisions, it is of no consequence that no relief may be available at all. After all, that is what "probationary employee" means. It is intended that such employees not have the full complement of "rights" afforded "non probationary employees." The court feels constrained, in light of the foregoing, to conclude that a *Bivens* action is not available to a claimant under the circumstances present in this case.

Counts I through IV of plaintiff's amended complaint all "sound" in "constitutional tort" of the type established by *Bivens* and disallowed in *Bush*. As noted, plaintiff, himself, has denominated these counts as "constitutional torts." Accordingly, defendant's motion to dismiss or for summary judgment will be granted as to these counts.

This disposition has rendered "moot" the other issues raised.

The parties are directed to brief, within 14

days from the date of this opinion, the issues of the scope of judicial review available to the plaintiff under the allegations of Count V of the amended complaint and the remedies theoretically available thereunder.

Dated: October 12, 1988

H. FRANKLIN WATERS
United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 89-1973WA

E. Stanton Maxey, M. D.
Appellant

v.

Dan G. Kadrovach, et al,
Appellees.

Appeal from the United States District
Court for the Western District of Arkansas.

Appellant's petition for rehearing has been considered by the Court and is denied.

January 12, 1990

Order entered at the Direction of the Court:
ROBERT D. ST. VRAIN
Clerk, U. S. Court of Appeals, Eighth Circuit.

Veterans Administration
Medical Center
Big Spring TX 79720
October 9, 1986

Dr. Edward S. Maxey
3912 E. Piccadilly Rd., Apt. #7
Phoenix, AZ 85018

Dear Dr. Maxey:

This is to officially confirm your Excepted Appointment as Staff Surgeon with our medical center at a Chief Grade, Step Ten, at a basic salary of $67,940 per annum effective October 26, 1986. this appointment is subject to a satisfactory completion of a physical examination to be conducted at the VA Medical Center in Phoenix, Arizona on October 14, 1986. You will report for duty in this office October 27, 1986 (Monday) at 8:00 A.M.

You will find enclosed a packet of processing forms to be completed and returned to this office in the enclosed envelope prior to your reporting for duty. Also enclosed is VA Form 5-3918 (ior First Duty Station). Please complete Part II and sign in Block 31A. You will then need to turn the form over and sign the agreement to remain in the Government Service for twelve months (or repay the government for costs of travel and transportation.) The completion of this form and signatures required are necessary in order that your moving

expenses will be paid.

If you have questions regarding the above, please contact Patsy Sharpnack, Personnel Staffing Specialist, 915 263-7361, Ext. 335.

We are also sending you a local newspaper and other informative material about the City of Big Spring. If there is anything else you need to assist you in your move, please let me know.

It is with pleasure that I welcome you as a member of our staff, and we look forward to your entering on duty.

Sincerely,
STEPHEN K. SINCLAIR
Personnel Officer

Personnel Service
Veterans Administration Medical Center
Big Spring, Texas 79720

Name: Edward S. Maxey Position: Staff Surgeon
You have been selected for Full Time Permanent, Excepted appointment Effective October 26, 1986.
( ) Please pick up physical examination forms from Personnel Service _____
(X)Report for processing in Personnel Service at 8:00 a.m., Monday, October 27, 1986
(X)Please fill out the following forms and bring them_____

( ) Application
(X) SF 256, Self-Identification of Medical Disability, and/or
( ) SF-177, Statement of Physical Ability
(X) TD-W-4
(X) SF-61B
(X) SF-85
(X) SF-144 (Only if you had prior Government/civilian or military/service.
(X) VA Form 5-4637 Educational Data.
( ) Transcript from your school of nursing (must have before you can be converted perm
(X) Car license number, car make, model and year (if you will drive to work.)
(X) Proof of license to practice your profession: ( ) certification of licensure and/or ( ) current

registration with expiration date.

(X) Please bring your military discharge (DD-214) or other document showing dates of military service (Need a DD-214 for each period of service.)

(X) SF-15 and proof of 10-point veteran preference if you claim 10-point preference.

(X) SF 181 Race and National Origin Identification.

(X)Attached pamphlets are for your information. Please try to decide by time you start to work whether or not you want your Federal Employees Group Life Insurance and if so, whether regular only or both regular and optional; and Federal Employees Health Benefits and if so which plan and option.

(X) SF 105, Certificate of Membership, CSC Retirement System.

(X) SF 2817A, Federal Employees Group Life Insurance Program.

(X) SF 2809-A, The Federal Employees Health Benefits Program.

(X) Health Benefit Brochures

THIS IS NOT A COMMITMENT FOR EMPLOYMENT

NOTIFICATION OF PERSONNEL ACTION

Name: Maxey, Edward S., M.D. SSN 267-09-0404
Date of Birth: 07-24-24 Veteran Preference: 1

(None)
Serv. Comp. Date: 10-26-86 Tenure: I
Retirement: FICA and CS 1.3% Sex: M
Regu: Basic Life Only FLSA: E (Exempt)
Effective Date 10-26-86 Work Schedule F (Fulltime)
Annuitant Indicator: 9 (Not Applicable)
Nature of Action: Excepted Appointment
Authority: 38 U.S.C. 4104/1/
To: Position Title and Number: Physician 000000
Name and Location of Employing Office:
VA Medical Center
Patient Care Svcs Surgical Service
Big Spring TX
Pay Plan: VM 0602 Grade or Level: Chief
Step or Rate: 10 Salary: $67,940.00*
Pay Bases: PA
Duty Station: Big Spring TX Position Occupied: 2 (Excepted)
Appropriation Code: 82C2.2280
*+$12,318 Special Pay Authorized under 38 USC 4118 NTE 10-25-90. Under PL 96-330, special pay is basic pay for CS retirement and life insurance purposes, but not for purposes of any other benefit related to basic pay. For CS retirement purposes, employment must be full-time.
Subject to completion of 2 year probationary period commencing * 00-00-00

Above-minimum entrance rate in accordance with KF-5, Part II, Chapter 3, Section D

CSRS coverage at appointment: No prior coverage.
Approving Official: Personnel Officer Date: 10-26-86

Notice to Employee

Keep this document for your records. It is a copy of the official record of a personnel action affecting your employment. Promptly call any error to the attention of your supervisor or your personnel office.

I. Condition Pertinent to All Types of Personnel Actions

The personnel action identified on the face of this form is subject to all applicable laws, rules and regulations governing Federal employment and may be subject to investigation and approval by the U. S. Office of Personnel Management. The action may be corrected or canceled if not in accordance with all legal requirements, or if based upon your misrepresentation or fraud.

In addition, the grade of the position to which you are officially assigned may be reviewed and corrected by your agency personnel office of by the U. S. Office of Personnel Management.

Items 8 and 9 show common types of payroll deductions: "FEGLI" for Federal Employees Group

Life Insurance, "CS" for Civil Service Retirement, "FICA" for Social Security, and "FS" for Foreign Service. Additional deductions may be made under the Federal Employees Health Benefits Program and for income taxes, bonds, and other purposes authorized by law.

II. Information About Appointments

Appointments to positions in the competitive service: The Civil Service Act places most positions in the "competitive service." The U. S. Office of Personnel Management sets qualification requirements and controls recruitment for such positions. As a general rule, persons selected from civil service registers to fill continuing jobs in the competitive service are given career-conditional appointments. Such appointments are secured through direct competition with other members of the general public seeking similar work in Government agencies and permit qualified employees to be assigned without further competitive examination to other jobs in the competitive service. Career-conditional appointments become career appointments upon completion of 3 years of substantially continuous creditable service.

The first year following a non-temporary competitive appointment generally is a probationary period during which an appointee must demonstrate full competence and fitness for Federal employment. Reinstatements are

also subject to a probationary period unless one was previously completed. Transfers, promotions, changes to lower grade, and reassignments during a probationary period are subject to completion of probation.

Temporary appointments do not confer a civil service status and do not lead to a career or career-conditional appointment without some further examination or qualification. Limited temporary appointments are made when there is no continuing need for a person's service, regardless of the manner in which he or she qualified for appointment; acceptance of such appointment will not remove a person's name from a civil service register on which he or she may later be reached for career-conditional appointment.

Appointments to positions in the excepted service: Excepted appointments are made to positions which are excepted from the competitive service by law or other special authority. Generally the employing agency sets qualification requirements and conducts recruitment for such positions. Such appointments do not confer a competitive civil service status or eligibility for movement to jobs in the competitive service, they may be made without restrictions on tenure, with a conditional or indefinite limitation, or with a defined time limitation. A trial period may be required at the discretion of the employing office.

Appointment to positions in Senior Executive Service

(SES): SES appointments are made to executive positions with managerial, supervisory or policy functions. SES career appointments are obtained through competition with other civil service employees or civil service employees and members of the general public. The first year of an initial SES career appointment is a probationary period, during which the appointee must demonstrate full competence and fitness for such employment.

SES noncareer and limited appointments do not confer competitive civil service status or lead to SES career appointments.

III. Information About Tenure Groups

Employees are ranked in tenure groups according to the nature of their appointment; those with unrestricted tenure are placed in Group 1; those serving under conditional appointments which automatically lead to full tenure after a prescribed time and without further qualification are placed in Group 2; and those serving under temporary or indefinite appointments not limited to an exact time or date are placed in Group 3. Within each tenure group, ranking is determined by veteran preference, performance rating, and total federal service. If it should become necessary to reduce force, employees are selected for separation or change to lower grade according to the general ranking. Employees serving under competitive appointments and those serving under

excepted appointments are ranked separately for reduction in force purposes.

Tenure group as used for reduction in force purposes does not apply to the Senior Executive Service. Code O may be shown in the tenure group for these employees.

IV. Information About Your Status After Separation

If you are separated or placed in a nonpay status for an extended period, your employing agency will furnish you with Standard Form explaining your rights to unemployment insurance benefits. If you are covered by the Civil Service Retirement System or Federal Employees Group Life Insurance, you have previously been furnished certificates describing these programs. Such certificates have information regarding your rights and possible benefits after separation.

If you are separated from a career or career-conditional appointment, you may have reinstatement eligibility and may apply directly to any Federal activity and may be employed without further competitive examination. If you are a nonveteran and you are separated from a career-conditional appointment your eligibility for reinstatement is generally limited to 3 years from the date of separation. If you are separated from a temporary or excepted appointment you have no reinstatement privileges based upon such service.

If you are separated from an SES career appointment, you may have reinstatement eligibility to the SES. You should apply directly to any Federal activity. If you are separated from an SES noncareer or limited appointment, you have no reinstatement privileges based upon such service.

You will be given any lump sum payment that may be due you for annual leave at the time of separation. Refund of an appropriate portion of this payment will be required if you are reemployed in a Federal agency in a position under the same leave system during a period covered by such payment.

V. Availability of Further Information

Consult your supervisor if you have questions about the above statements or the entries on the front of this form, or about other matters concerning your employment. This is particularly important in questions involving granting of leave, assignment of duties, and hours of work which are generally under the supervisor's control. If your questions are technical, your supervisor may refer you to your personnel office, which will have copies of controlling regulations, as well as your individual records and how they apply in your case.

MEMORANDUM

Date: July 30, 1987
From: Acting Chief, Surgical Service (112)
Subj: Clinical Privileges
To: Chairman, Clinical Executive Board (11)

Request the following clinical privileges for the new staff general surgeon, E. Stanton Maxey, M.D.:

General Surgery

E. Stanton Maxey, M.D. is Board Certified in General Surgery.

(a) This Specialty Board certifies competency in surgery of the gastrointestinal tract, abdomen, breast, head and neck, peripheral vascular surgery, surgery of the endocrine system and includes surgery for trauma of the musculoskeletal system and head injuries. In emergency situations, uncomplicated surgery of the genito-urinary tract, chest case, orthopedic surgery, and peripheral nervous system is allowed since by training and experience they are knowledgeable in these areas. Also included are diagnostic angiography and endoscopy. Consultations should be utilized in complicated cases and in those cases involving unusual surgical risk.

(b) These privileges do not include brain surgery or major thoracic surgery such as pneumonectomy and/or

lobectomy. These cases will be transferred. Only in exceptional circumstances may such cases be allowed provided a consultant thoracic surgeon or neurosurgeon is present and scrubbed.

Class 1. Major General Surgery

a. Permission for any operative procedure, emergency or elective, qualified as outlined in paragraphs a and b above:

DAVID K. MCAFEE, M.D.

Recommend Approval:

MEMORANDUM

Date: July 30, 1987
From: Acting Chief, Surgical Service (112)
Subj: Temporary Clinical Privileges
To: Chief of Staff (11)

1. Request temporary clinical privileges for E. Stanton Maxey, M.D.

2. Clinical privileges will be formally requested at the August Clinical Executive Board, see attached.

DAVID K. MCAFEE, M.D.

End.1

To: Medical Center Director (00)
Thru: Associate Medical Center Director (001)
Special Assistant to Director (007)

Recommend APPROVAL of temporary Clinical Privileges for E. Stanton Maxey, M.D., as requested.

JACK D. FICKEL, M.D.
Chief of Staff

Temporary Clinical Privileges for E. Stanton Maxey, M.D., APPROVED/DISAPPROVED:

DAN G. KADROVACH
Medical Center Director
Date: 8-6-87

MEMORANDUM

Date: August 10, 1987
From: Acting Chief, Surgical Service (112)
Sub: Surgical Privileges Application and Instructions

To: All Surgical Service Physicians

1. This packet contains a list of surgical procedures in your specialty. Privileges must be requested in *all areas* that you desire to practice. Desired privileges in this specialty that are not listed, should be itemized under, "Other Privileges." Practitioners will be considered for privileges based on the area requested, qualifications and experience. It should be noted that in a *"life threatening emergency,"* a practitioner may render whatever care he believes to be indicated, regardless of the privileges requested.

2. Privileges should be requested in the following manner:

____If a full category credential is desired, check box #1 to the right of the category level in the clinical area involved.

____If limited privileges in a given category are desired, check box #2 to the right of the category level and check the box adjacent to specific privilege requested.

____If no privileges are desired in a given category, check box #3 to the right of the category level.

DAVID K. MCAFEE, M.D.

Clinical Privileges—Surgery

Gen. Surgery 1

_Appendectomy
_Abdom.-Perineal Resect.
_Resect. Lge. or Sml. Bowel
_Gastric Resection
_Gastroenterostomy
_Pyloroplasty
_Vagotomy
_Ramstead procedure
_Cholecystectomy
_Common Duct Explor.
and Repair
_Enteroenterostomy

_Splenectomy
_Adrenalectomy
_Pancreatectomy
_Fundoplication
_Omental Resection
_Whipple Procedure
_Radical Node Dissection
(retroperitoneal)
_Partial Hepatectomy
_Choleocystojejunostomy
_Pull-Through Procedure

Rectum 1

_Rectal Biopsy
_Anal Fissure

_Fistula-In-Ano
_Sigmoidoscopy
_I&D Abscess
_Hemorrhoidectomy,
Internal & External
_Endoscopy Polypectomy
_Anoplasty
_Rectal Prolapse

Thyroid 1
_Thyroidectomy
_Thyroglossal Duct Cyst
_Parathyroidectomy With or
Without Sternal Split

Skin & Subcutaneous 1
_Electrodesication, Warts
_Suture, Uncomp. Wound
_Excision Simple Lesions
Cysts, Nevi, Limpmata

Gen. Surgery 1
Hernia Repair
_Diaphragmatic
_Femoral
_Incisional
_Inguinal
_Other

Endoscopic Proc. 3
_Bronchoscopy
_Duidoscopy
_Esophagoscopy
_Gastroscopy

_Peritoneoscopy
_Colonoscopy
_Laryngoscopy
Lymph Channels and Nodes 1
_Biopsy
_Incision and Drainage
_Excision
_Radical Lymphadenectomy
Breasts 1
_Excision of Tumor or Cyst
_Incision and Drainage,
Abscess
_Mastecomy, Simple
_Mastectomy, Radical
_Mammoplasty
Vascular 2
_Aneurysmectomy, Abd.,
Peripheral
_Bypass Arterial Surgery
_Embolectomy
_Thrombectomy
xVeinstripping & Ligation
xVena Cava Plication
and Clip.
_Portacaval Shunts
_Mesocaval Shunts
_Endarterectomies
_Arteriography
Excision 2
xBranchial Cleft Cysts

xParotid Gland With or
Without Rad. Neck
xTumor, Nose or Sinus
_Burns, 1st, 2nd, 3rd (10%)
_I&D Superficial Abscess
_Deep Abscess, Thyroglossal
Duct, Cyst, etc.
_Excision Ingrown Toenail
_Skin Grafting
_Pilonidal Cyst
Lungs, Pleura, Cardiovascular 2
_Pleural Abrasion/Stripping
_Tumor
_Trauma
_Pulmonary Resec. or Biopsy
_Transthoracic Hiatal Hernia
_Diag. & Ther. Endoscopy
_Diaphragm & Chest Wall
_Phrenic Nerve
_Escophageal Resection
_Heller Myotomy
_Rib Resection
_Drainage Lung Abscess/Empyema
_Repair Vascular Injuries
i.e. Carotid, Subclavian,
Innominate
_Dx & Rx Thoracic Outlet
Syndrome
_Surgical Care, General
_Tracheal Resection

_Repair of Tracheal-
Esophageal Fistula
_Mediastinal Tumor, Excis.
_Pericardiectomy
_Pulmonary Lobectomy
_Thoracotomy, Explor.
_Thromboembolectomy, Axill.
_Thromboembolectomy, Fem.
xThoracentesis
xTube Throacostomy
BONES AND JOINTS 2
xJoint Aspirations
xBursa Injections
xI&D Hematomas
xI&D Bursae
xI&D Abscess
xExc. Ganglia, Nodules
xAmputation, Simple
(fingers, toes, etc.)
xAmputation, Major
xTendon Repair
_Extensive Lingual Tumor
_Nasopharyngeal Tumor
_Oropharyngeal Tumor
_Hypopharyngeal Tumor
_Laryngectomy
_Zenker's Diverticulum
xRadical Neck Dissection
_Endoscopic Excision Tumor
xTracheostomy

GENITOURINARY
xCircumcision
_Cystoscopy, Urethroscopy
_Cystectomy
_Cystotomy
_Epididymectomy
xHydrolectomy
_Nephrectomy Partial/Total
xOrchiectomy
_Prostatectomy
xVaricocele
xSpermatocoelectomy
_Ureteroneocystostomy
_Harvest Donor Kidney
xHysterectomy
xSalpingo-oorphorectomy
_Pelvic Extenteration
xPlastic Operation on
Kidneys or Ureters
NERVOUS SYSTEM2
_Cervical Sympathectomy
_Dorsal Sympathectomy
xLumbar Sympathectomy
_Carotid Endarterectomy
_Degenerative Carotid Sinus
xLigation, Carotid Artery
_Expl. & Repair Peripheral
Nerves
_Internal & External
Neurolysis

xLumbar Puncture
_Nerve Block
_Emergency Care, General
_Laminectomy
MISCELLANEOUS SKIN2
_Severe Facial Lacerations
xHand Lacerations
xExc. Skin Neoplasms
xExc. Hemangiomata
xExc. Dormal Tumors
xTendon Repaid
xGanglion, Wrist
_Hemipelvectomy
_Forequarter Amputation
_Bone Biopsy
xClosed Reduction of
Fracture of Dislocation
BURNS1
_1st Degree,
Local Treatment Only
_2nd & erd Degree, Local
Treatment Only
CAST APPLICATION1
_Long Arm Cast
_Short Arm Cast
_Long Arm Splint
_Short Arm Splint
_Long Leg Cast
_Cylinder Cast
_Short Leg Cast

_Walker Addition
_Long Leg Splint
_Short Leg Splint
CAST REMOVAL1
_ Bivalve
_Arm or Leg
_E.D.F. Cast
_Pedicle Graft
_Tubular Graft
_Reparative Hand Surgery
xRepair Lacerations, Simple
Complex
TUBE INTRODUCTION2
xEndotracheal Intubation
xTracheostomy
xTube Tracheostomy
xFoley Catheter
_Suprapubic Catheter
_Peritoneal Lavage
xInsert CVP Lines
_Insert Arterial Lines
OTHER PROCEDURES

_____

_____

Petitioner's Appendix continues
in the next volume.